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GOVERNMENT IN THE SUNSHINE ACT

MARCH 8, 1976.—Ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 11656]

The Committee on Government Operations, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

AMENDMENTS

The two committee amendments, each of which is of a technical and conforming nature, are:

Page 7, line 3, before "closed" insert "to be".

Page 16, line 12, after "party" insert "or interested person".

EXPLANATION OF AMENDMENTS

The first amendment changes from the present to the future tense a reference to a meeting that has not yet been held.

The second amendment conforms one subparagraph of the ex parte communications provisions of the bill to the remainder of those provisions. The prohibition on such communications to an agency decisionmaking official applies to anyone who is an "interested person". Subparagraph (D) of the proposed section 557(d)(1) of title 5, United States Code, refers in its original form only to a "party", and the amendment adds "interested person" so as to make this subparagraph conform to the rest of section 4.

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PURPOSE

The purpose of H.R. 11656 is to provide that meetings of multi-member Federal agencies shall be open to the public, with the exception of discussions of several narrowly defined areas. The bill also prohibits ex parte communications to and from agency decisionmaking officials with respect to the merits of pending proceedings.

The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived." Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.

In a theoretical sense, the agencies in the executive branch are already accountable to the people through the President, who is indirectly elected, and the Congress, whose members are directly elected. This theoretical accountability, though, leaves agency commissioners far removed from the public view in their day-to-day activities.

Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first-hand. In the words of FCC Commissioner Glen O. Robinson, who testified before the Government Information and Individual Rights Subcommittee on this legislation:

> Chief among the benefits [of the legislation] is increasing public understanding of administrative decisionmaking processes. * * * I do not know whether that understanding will lead to greater confidence in administrative decisionmaking. * * * Quite possibly, it could lead to less confidence. But either of these outcomes * * * can be beneficial: if, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals and agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust. (Hearings on H.R. 10315 and H.R. 9868, p. 98.)

The legislation requires that when an agency closes a meeting under one of the exemptions in the bill, it must make a recording or verbatim transcript of the closed portion and release to the public any part of the recording or transcript that does not contain exempt information. A second purpose of this requirement is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely, the release by the court of the transcript of the illegally closed portion.

The purpose of the provisions of the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

SUMMARY OF MAJOR PROVISIONS OF THE LEGISLATION
OPEN MEETINGS

The open meeting provisions would apply to the approximately 50 Federal agencies that (1) are presently covered by the Freedom of Information Act and the Privacy Act, and (2) are headed by a body of two or more members, a majority of whom are chosen by the President with the advice and consent of the Senate. The measure is also expressly made applicable to the Federal Election Commission and the Post Service. Meetings covered under the bill include not only sessions at which formal action is taken, but also those at which a quorum of members deliberates regarding the conduct or disposition of agency business. A chance encounter or social gathering would not be a meeting within the meaning of the bill so long as no agency business is conducted or disposed of.

The bill requires that every part of every meeting be open to the public unless it falls within one of the bill's 10 specific exemptions. In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness. Even if a matter falls within an exemption, the discussion must be open where the public interest so requires.

No meeting or portion thereof may be closed unless a majority of the entire membership votes to take such action. Such a vote need not itself occur during a meeting and could properly be taken by circulating a written ballot or tally sheet. If such a vote is taken during a meeting, the discussion and vote must of course be open to the public unless within one of the exemptions.

A copy of each vote on closing a meeting must be made available to the public whether or not the meeting or portion is closed. This will inform the public as to the full voting record of each agency member on openness questions. When a vote on the issue of closing fulfills the requirements for closing, a full written explanation of the action and a list of all persons expected to attend the meeting must also be made public.

Agencies are required to public announce, at least one week prior to a meeting, its date, location, and other relevant information.

The keeping of a complete, verbatim transcript or electronic recording of each portion of a meeting closed to the public would be required (except for discussions dealing with adjudications or agency participation in civil actions), and any portion of each transcript or recording whose release would not have the effect set forth in one or more of the exemptions would have to be made available to the public. Information may be deleted only if it falls within an exemption and disclosure is not required by the public interest, and deletions would be replaced by a written explanation of the reason and the statutory authority for each. Written minutes of open meetings will also be required to be kept and made publicly available.

Any person could challenge in court the closing of a meeting or any other violation of the openness requirements of the bill, and the burden

of sustaining the closing or other action in question would be upon the agency. The court could grant any appropriation relief, including but not limited to enjoining future violations of the act or releasing the transcript of an improperly closed meeting.

Ex Parte Communications

Section 4 of the bill would enact a general prohibition on ex parte communications between agency decisionmaking personnel, including commissioners and administrative law judges, and outside persons having an interest in the outcome of a pending proceeding. These provisions would apply to executive agencies without regard to whether they are headed by a collegial body or a single individual.

The communications prohibited by the ex parte section would include only those relative to the merits of the proceeding. Thus, an inquiry of an agency clerk as to the procedural status of an adjudication or rulemaking matter would not be unlawful under the bill. A violation of the prohibition could result in sanctions up to and including loss of the proceeding on the merits (as under existing case law). *See, e.g., Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), *cert. denied*, 382 U.S. 893 (1965).

History of the Legislation

This legislation represents a further, logical step in the continuing process of opening governmental decisionmaking to the public at the Federal and State levels.

The Freedom of Information Act, making documents of executive departments and agencies generally available to the public, was enacted in 1966 (Public Law 89–487, 80 Stat. 250) and codified as section 552 of title 5, United States Code, the following year (Public Law 90–23, 81 Stat. 54).

In 1972, Congress enacted the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770, 5 U.S.C. App. I), designed to open to the public the meetings of advisory committees, study panels and ad hoc committees in the executive branch.

In 1974, after eight years of experience under the Freedom of Information Act and several series of oversight hearings and studies, Congress enacted strengthening amendments to that statute (Public Law 93–502, 88 Stat. 1561).

In March 1973, the House adopted H. Res. 259, generally requiring meetings of House committees (including markup sessions) to be open to the public. On November 5, 1975, the Senate adopted S. Res. 9, opening to public observation markups and other sessions of Senate committees. The adoption of S. Res. 9 also completed the necessary action to open meetings of conference committees (the House action in this regard had been taken earlier in 1975 by H. Res. 5, but the effectiveness of the House provision had been stayed pending the adoption of a similar rule by the Senate).

The present legislation relates only to open meetings of agencies in the executive branch. It made its first congressional appearance in

1972 (H.R. 16450, 92d Cong., 2d Sess.) and was reintroduced in the 93d Congress with a total of almost 50 co-sponsors. In the present Congress, various versions of the legislation in the House have a total of 85 co-sponsors.

The Senate Government Operations Subcommittee on Executive Reorganization held hearings on S. 260, a counterpart to H.R. 11656, in 1974, and passed S. 5, a similar measure, on November 6, 1975, by a vote of 94–0.

Hearings

The Government Information and Individual Rights Subcommittee held hearings on H.R. 10315 and H.R. 9868, earlier versions of this legislation, on November 6 and 12, 1975. Witnesses included representatives of executive agencies, the press, the bar, and the public.

Committee Vote

At a meeting of the full Committee on Government Operations on March 2, 1976, a quorum being present, H.R. 11656, as amended, was approved and ordered reported by a vote of 32 ayes to 7 nays.

Statement Pursuant to Clause 7(a) of Rule XIII

The committee estimates that the ex parte provisions of the legislation will result in no additional costs.

The committee anticipates that most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require. The committee estimates that such costs will be minimal.

Under the bill, most agency meetings will be open to the public and will therefore not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (Ordinarily, a member of the public desiring his own set of the minutes will bear the expense of copying.) The only other cost of an open meeting under this legislation is that of the public announcement; this too, should be negligible.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. Thus, the more frequently an agency closes meetings, the greater will be the cost. Considering the approximately 50 covered agencies as a whole, the committee estimates that relatively few portions of meetings will be closed and that the costs associated with closings will therefore be minimal. This cost will be further reduced if an electronic recording device, rather than stenographic notation, is used. The cost of electronic recording equipment estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

The committee's estimate comports with that provided by the Comptroller General.

Statement Pursuant to Clause 2(l) of Rule XI

(A) No oversight findings or recommendations have been made with regard to this measure.

(B) This measure does not provide for additional budget authority.

(C) The estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974 follow. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

COST ESTIMATE

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62,500
Fiscal year 1977	130,000
Fiscal year 1978	[2] 138,000
Fiscal year 1979	145,000
Fiscal year 1980	152,000
Fiscal year 1981	160,000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

BASIS OF ESTIMATE

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

ESTIMATE COMPARISON

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

Statement Pursuant to Clause 2(l)(4) of Rule XI

The enactment of this bill into law is not expected to have any inflationary impact on prices or costs in the operation of the national economy.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 provides that this act may be cited as the "Government in the Sunshine Act."

SECTION 2

Section 2 declares that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this act to provide the public with such information to the maximum extent possible without infringing the rights of individuals or significantly interfering with the ability of the Government to carry out its substantive responsibilities.

SECTION 3

Section 3 adds a new section 552b, entitled "Open meetings", to title 5 of the United States Code.

Subsection (a)

Subsection (a) defines certain terms employed in section 552b. Since section 552b will be part of chapter 5 of title 5, United States Code, the definitions contained in existing section 551 also apply to it unless inconsistent with the definitions in subsection (a).

The term "agency" includes (1) any Federal agency, as defined under the Freedom of Information Act (5 U.S.C. § 552(e)), which is headed by a collegial body composed of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate, (2) any subdivision thereof authorized to act on behalf of the agency (without regard to the number of members composing or included in the subdivision), and (3) the Federal Election Commission. Though a single agency head, his deputy, and his assistants may "head" an agency in the colloquial sense, they do not have common duties and thus are not a collegial body, and their agency would not come within this definition. On the other hand, while the chair of a commission that heads an agency may have certain responsibilities over and above those of his or her fellow commissioners, his or her position as *primus inter pares* would not remove the agency from the coverage of section 552b.

A subdivision of an agency covered under section 552b is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b.

While the definition of agency does not include advisory committees generally, it does include other bodies composed of part-time Govern-

ment employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so forth. Such a board or group would come within the definition of an agency even though day-to-day supervision might be provided by a single administrator. A specific provision as to the applicability of the Federal Advisory Committee Act, 5 U.S.C. App. I, is contained in subsection (o) of section 552b.

The use of a generic definition for the agencies covered by the bill parallels the Administrative Procedure Act, 5 U.S.C. § 551(1), the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

MEETING

The term "meeting" means the deliberations of at least the number of agency members required to take action on behalf of the agency, where such deliberations concern the joint conduct or disposition of agency business. The word "deliberations" includes not only a gathering of the requisite number of members in a single physical place, but also, for example, a conference telephone call or a series of two-party calls involving the requisite number of members and conducting agency business. The conduct of agency business is intended to include not just the formal decisionmaking or voting, but *all* discussion relating to the business of the agency. The limitation of the definition to "joint" conduct is intended to exclude a situation where the requisite number of members is physically present in one place but not conducting agency business as a body (as, e.g., at a meeting at which one member is giving a speech while a number of his fellow members are scattered throughout the audience). It does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business.

MEMBER

The term "member" means an individual who belongs to a collegial body heading an agency. Such an individual is a member for the purposes of section 552b even if not appointed by the President and confirmed by the Senate, so long as a majority of the members of the body are so appointed and confirmed.

Subsection (b)

Subsection (b) sets forth the basic principle of section 552b, namely, that unless specifically exempted by subsection (c), every portion of every meeting must be open to public observation. The presumption in every instance is that a meeting shall be open to the public, and this presumption may be overcome only by a preponderant showing that the portion proposed to be closed clearly comes within one of the exemptions contained in subsection (c).

The phrase "open to public observation," while not affording the public any additional right to participate in a meeting, is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

Subsection (c)

Subsection (c) sets forth the circumstances under which a meeting or portion thereof may be closed to the public, and under which specified information developed in such a meeting or portion need not be disclosed to the public. The subsection contains 10 exemptions to the general rule of openness set forth in subsection (b), but provides that even if a meeting or information falls within one of them, it shall not be closed (or, in the case of information, withheld), if the public interest requires otherwise. This balancing procedure is to be performed by the agency in the first instance.

The provision permits closing where the agency properly determines that the discussion is likely to come within one or more of the exemptions. It lets the agency withhold information contained in a transcript or recording where the disclosure of the information would in fact have the effect set forth in one or more exemptions. The burden of sustaining a closing or withholding is at all times upon the agency.

The specific exemptions are:

(*1*) Exemption 1 covers matters that are specifically authorized under criteria established under an Executive order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. No matters may be withheld under this exemption unless they meet both requirements. In order for material to be "properly classified", it must have been originally classified pursuant to the applicable Executive order, remain entitled to such classification, and currently be protected from loss or compromise pursuant to the provisions of the Executive order.

Under subsection (h) of section 552b, a court considering whether this or any other exemption has been properly invoked may examine the transcript or electronic recording of the meeting in camera, and may take any other evidence it deems necessary.

(*2*) This exemption includes meetings relating solely to an agency's internal personnel rules and practices. It is intended to protect the privacy of staff members and to cover the handling of strictly internal matters. It does not include discussions or information dealing with agency policies governing employees' dealings with the public, such as manuals or directives setting forth job functions or procedures. As is the case with all of the exemptions, a closing or withholding permitted by this paragraph should not be made if the public interest requires otherwise.

(*3*) This paragraph permits closing or withholding where a statute other than section 552b requires the withholding of the information in question and establishes particular criteria defining such information or refers to particular types of information. A statute that merely permits withholding, rather than affirmatively requiring it, would not come within this paragraph, nor would a statute that fails to define with particularity the type of information it requires to be withheld.

Thus, for example, section 1104 of the Federal Aviation Act of 1958, (49 U.S.C. § 1504), which allows the Federal Aviation Administration to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public," would not qualify under this exemption. *See Adminis-*

trator, FAA v. *Robertson*, 422 U.S. 255 (1972). Similarly, the Freedom of Information Act (5 U.S.C. 552), which permits but does not require the withholding of information would not come within this exemption; and the Trade Secrets Act (18 U.S.C. § 1905), which relates only to the disclosure of information "not authorized by law," would not permit the withholding of information whose disclosure is required under the Freedom of Information Act or under this act, since FOIA and this act authorize its disclosure. (In connection with section 1905, see *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F. 2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.)

Examples of statutes that could justify a closing or withholding under paragraph 3 include sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e–5(b), 2000e–8(e)), and section 314(a)(3) of the Federal Election Campaign (2 U.S.C. § 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

(*4*) This exemption, which is identical to the trade secrets exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), protects trade secrets and commercial or financial information obtained from a person and privileged or confidential. A "trade secret" has been defined judicially as:

> An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Comm.*, 6 F. 2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927).

This exemption also includes matter subject to certain evidentiary privileges (doctor-patient, attorney-client) and confidential commercial or financial information. The adoption of language following that in the Freedom of Information Act is with recognition of judicial interpretations of the FOIA exemption.

(*5*) Exemption (5) covers discussions that involve accusing any person of a crime or formally censuring any person. In order to be covered by this paragraph, the discussion must relate to a specified person or persons and, if possible criminal violation is at issue, a specific crime or crimes. Further, the agency must be considering a possible action of a formal nature against the person in question.

Although the statute contains a general presumption in favor of open meetings, this exemption balances that presumption against the individual's right of privacy. Unless the public interest requires otherwise, this exemption permits an agency to close a discussion that deals with and precedes a decision whether to take formal action against an individual.

(*6*) This paragraph permits the closing of a meeting where the discussion would reveal personal information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. Like exemption (5), this paragraph balances the need for openness against the individual's right to privacy. It would, for example, allow the closing of a discussion of an individual's health or alleged drinking habits.

In addition to the applicability of the general rule that allows such a discussion to be open if that is in the public interest, the committee notes that there may be circumstances where the official status of the individual in question affects whether this exemption should be invoked (e.g., a discussion of an individual's competence to perform his job might be open if he is a high government official, but closed if he is of a lower rank or a private citizen). *Compare New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), *with Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

Since the primary purpose of this exemption and of exemption (5) is to protect the privacy of the person in question, the exemptions should not ordinarily be utilized to close a meeting that the subject would prefer to have open.

(*7*) This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption recognizes that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

To justify closing under this exemption, the records in question must relate to a specific person or persons. The fact that the identity of a confidential source may be withheld does not justify the withholding of information secured from such a source which does not in and of itself reveal the identity of the source. Another governmental agency may not be a "confidential" source, as the intent of subparagraph (D) is to protect citizen informants and like sources.

An investigation may not be a "lawful" national security investigation unless it is carried on within the Constitution and applicable laws. Thus, a discussion involving the records of unlawful activities in such programs as CHAOS, COINTELPRO, and illegal CIA and FBI mail opening does not involve a lawful national security investigation.

The provision relating to investigative techniques and procedures does not include matters already known to the public. Thus, although a meeting might be closed if it concerns a new technique for crime detection only to the extent that the discussion is likely to bring out aspects of it not already made public through judicial proceedings, news stories, and the like.

The provision relating to an invasion of personal privacy is limited to the privacy of an individual. See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9 (1975).

(*8*) This exemption applies to meetings which would, if open, disclose information contained in or relating to examination, operating, or condition reports on financial institutions. Such reports are prepared by or for such bank regulatory agencies as the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board. This provision is identical to exemption (8) of the Freedom of Information Act.

(*9*) This exemption protects information whose premature disclosure would have certain adverse affects. Subparagraph (A), which applies solely to agencies that regulate securities, currencies, commodities or financial institutions, includes information whose disclosure would be likely to lead to significant financial speculation or to significantly endanger the stability of any financial institution. This subparagraph would cover many of the regulatory activities of such agencies as the Federal Reserve Board and the Securities and Exchange Commission.

Subparagraph (9) (B) applies to all agencies and protects information whose premature disclosure would be likely to significantly frustrate an agency action that has not yet taken place. This provision does not apply to such information, though, if the content or nature of the proposed action has already been disclosed to the public by the agency or the agency is required by law to disclose it to the public before final approval of the action. In the case of rule making, for example, where an agency has or will be required to publish the proposed rule for notice and comment prior to placing it in effect, subparagraph (9) (B) would not permit closing of a discussion of the proposal.

If it is not already covered by exemption (2) an agency's discussion of its strategy in labor negotiations, or a Civil Service Commission discussion of labor negotiation strategy for other agencies, could come within paragraph (9) (B).

As with several other exemptions, exemption (9) employs a balancing test between the presumption in favor of openness and the need to delay the disclosure of certain information in the interest of proper administration. The use of the words "significant" and "significantly" is intended to limit closings under this paragraph to instances wherein disclosure at the time in question would have a considerable adverse effect.

(*10*) This paragraph includes discussions specifically concerning the agency's issuance of a subpoena, participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal adjudication involving a determination on the record after opportunity for a hearing (whether or not pursuant to 5 U.S.C. § 554).

A discussion of whether to commence a civil action or adjudicatory proceeding, or to formally request the Justice Department to commence a civil action, is included within the ambit of this exemption.

Among the reasons for this exemption are the need to allow an agency to discuss in private its strategy in litigation in which it is

involved and the fact that, when acting in an adjudicatory proceeding, the agency is relying upon the written record and acting in a quasi-judicial fashion.

Of course, if the public interest or another provision of law (see discussion of subsection (m), *infra*) so requires, a discussion falling within the literal terms of this or any other exemption must be open to the public.

Subsection (d)

Subsection (d) sets forth the procedures governing the closing of meetings, or portions of meetings, subject to the criteria set forth in subsection (e).

Subsection (d)(1) allows the closing of a meeting or the withholding of information only when a majority of the agency members votes to take such action, and requires a separate vote for each meeting a portion or portions of which are proposed to be closed. There is no requirement that a vote on whether to close a meeting must itself be taken at a meeting, and the seriatim marking of a written tally sheet would be a permissible means of taking such a vote. If, though, a vote on whether to close a meeting is taken at that meeting or a prior meeting, the vote and all discussion leading up to it must be open unless closed under one of the exemptions set forth in subsection (c).

Subsection (d)(1) permits a single vote to be taken with respect to a series of portions of meetings if all are to be held within thirty days after the first and all involve the same particular item (i.e., not just a general discussion of a generic subject).

No proxy votes may be cast in a vote on whether to close a meeting, and the vote of each agency member must be recorded so as to permit identification by name of how each member has voted.

Subsection (d)(2) permits any person whose interests may be directly affected by a portion of a meeting to request that it be closed under exemption (5) (accusation of a crime), (6) (personal privacy) or (7) (investigatory records). If any agency member so requests, the agency must vote by recorded vote whether to close the meeting in response to the request.

Subsection (d)(3) requires that within one day after a vote on whether to close a meeting or withhold information, the agency must make publicly available a written statement setting forth the vote of each member. All such votes must be made public in this manner, even if the decision has been to keep the meeting open or to release the information in question. This will enable the general public to be aware of an agency member's overall voting record on openness questions.

Subsection (d)(3) also requires, that if a meeting is to be closed to the public, the agency shall, within one day after the decision to close is reached, make publicly available a full written explanation of the action and a list of the names and affiliations of all persons expected to attend the meeting. Such an explanation should note the paragraph or subparagraph of subsection (c) which is the basis for the closing, and should explain how the discussion falls into that exemption and the factors that were considered in reaching the deci-

sion to close. It should in every instance be as detailed as possible without revealing the exempt information.

This subsection and others in the bill require that certain information be made available to the public. The committee, desiring to avoid the expense and delay attendant upon requiring publication of such matter in the Federal Register, has not mandated this in any instance. The committee does intend, though, that all reasonable means be used to assure that the public is fully informed of such information. Means of publicizing such information should include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest, and sending them to the individuals on the agency's general mailing list or a mailing list maintained for those who desire to receive such material. Publication in the Federal Register, while not mandated by the bill, provides a further potential means of publicizing these announcements and should be used wherever possible.

Subsection (d)(4) permits any agency a majority of whose meetings may properly be closed pursuant to exemptions (4), (8), (9)(A), or (10) to provide by regulation for the use of an expedited procedure for the closing of meetings coming within those exemptions. Closings under this paragraph will not be subject to the following requirements normally imposed by the bill: providing one week's advance notice of the meeting; taking a vote on whether close prior to the time of the meeting; providing an explanation for the closing; providing advance notice of the name of an official who will respond to requests for information about the meetings; and taking a vote of the agency membership to change the agenda for a meeting after it has originally been announced.

Closing will be permitted under this provision only if the agency so votes by recorded vote no later than the beginning of the meeting or portion in question and gives public notice of the date, place and subject matter of each portion of the meeting at the earliest practicable time and in no case later than the commencement of the meeting or portion. While the vote to close is not required to be made public within one day after it is taken, it must be made public as promptly as is physically possible.

Subsection (d)(4) will simplify closing procedures for agencies regulating securities, commodities, and financial institutions, who must often meet on very short notice, and agencies whose primary or sole responsibility is to conduct adjudicatory proceedings. Examples of agencies expected to qualify under this paragraph are the Securities and Exchange Commission, the Federal Reserve Board and the National Labor Relations Board.

Subsection (e)

This subsection requires a week's public notice of the date, place, and subject matter of a meeting, as well as whether it is to be open or closed and the name and telephone number of an agency official who will respond to requests for information regarding the meeting. The one-week period may be shortened if a majority of the agency membership votes by recorded vote that the agency business so requires, in which case the announcement shall be made at the earliest practicable time and in no case later than the commencement of the

case of a transcript) or transcription (for a recording) and, when in the public interest, or primarily of benefit to the public, the material should be furnished without charge. In no instance should fees be set with the purpose of discouraging public requests for transcripts or transcriptions; their sole purpose is to permit recovery of some or all of the direct cost of providing them.

Subsection (f)(2) requires that written minutes be made of all meetings open to the public, and that they be made available for public inspection without charge. Copies are to be furnished to the public at no greater than the actual, direct cost of duplication or, if in the public interest without charge. The minutes shall be maintained for a period of at least two years after the meeting.

Most, if not all agencies already keep minutes of their meetings. This provision would permit an individual who is unaware of or unable to attend an open meeting to ascertain with ease what transpired there.

Subsection (g)

This subsection required each agency, within 180 days after the date of enactment of this section and following consultation with the Office of the Chairman of the Administrative Conference of the United States and 30 days' notice for comment in the Federal Register, to promulgate regulations to implement subsections (b) through (f). Should an agency fail to promulgate regulations within the 180-day period, any person may bring a proceeding in the United States District Court for the District of Columbia to require promulgation.

Once regulations have been promulgated by an agency, they are subject to challenge by any person in the United States Court of Appeals for the District of Columbia Circuit. Such a proceeding would be subject to the same statute of limitations as any other proceeding challenging a rule-making order of the agency in question. *See, e.g.*, 28 U.S.C. § 2344, 47 U.S.C. § 402 (c). This limitation of time for a direct challenge to the regulations is of course not intended to limit the right of a litigant to question their validity when they are applied to him at some later date. *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

Subsection (h)

Subsection (h) permits any person to bring an action in a United States District Court against an agency or any members thereof to enforce the requirements of subsections (b) through (f). Such a suit must be commenced no later than 60 days after the meeting in question, except that if public announcement in accord with this section is not made, the plaintiff may commence his action at any time up to 60 days after a public announcement of the meeting is in fact made. As in subsections (d) and (e), any public announcement must be made in a manner calculated to assure its wide dissemination in order to qualify as a "public announcement" as that term is used herein. The plaintiff need not pursue any remedies or appeals within the agency prior to bringing suit under this subsection.

An action may be brought in the district wherein the plaintiff resides or has his principal place of business, or where the agency in question has its headquarters. Venue provisions permitting the plaintiff to sue where he resides are applicable generally to actions against officers of the United States, 28 U.S.C. § 1391(e), as well as in actions under

meeting or portion in question. Such a vote shall be made public as promptly as it physically possible.

No change may be made in any of the items required to appear in the meeting notice once it has been made public except by a recorded vote of the majority of the agency upon a determination that the agency business requires the change and that no earlier announcement thereof was possible. The agency must announce the change and the vote of each member at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

The subject-matter identification required by this subsection must be of a specific nature, e.g., the docket names or titles and numbers, rather than a general statement as to the generic subjects to be discussed. Affording the public less than one week's notice, or making changes after the meeting has been publicly announced, should occur only on an emergency basis.

Subsection (f)

Subsection (f)(1) requires that a complete, verbatim transcript or electronic recording be made of any meeting or portion closed to the public, except for meetings closed under exemption (10) (civil actions and adjudications). Once the meeting has been concluded and the transcript or recording prepared, the agency must make public such portions of it as it determines (by recorded vote) not to contain information exempt from disclosure under subsection (c). In place of each deletion, the agency must supply a written explanation of the reason therefor and the identity of the statute said to permit the deletion. This explanation would not be required to disclose exempt information.

The transcript or recording must be made easily accessible to the public and available for inspection without charge. If made available in the form of a recording, provision must be made so that the identity of each speaker is disclosed. The agency must furnish copies of the transcript (or transcription of the recording) at no greater than the actual, direct cost of duplication; if the public interest so requires, copies shall be made available without charge.

A complete copy of the transcript or recording must be maintained for two years after the meeting or until one year after the conclusion of the proceeding in question, whichever occurs later.

The premise of this bill is that almost all agency meetings will be open, and that as a result, relatively few transcripts or recordings will have to be made. One reason for requiring a transcript or recording is that, once a closed meeting is actually held, most or all of it may turn out to be non-exempt. The existence of the transcript or recording allows the release of the discussion as soon as this fact becomes apparent (albeit after the meeting has been held). A second reason, related to judicial review, is discussed under subsection (h), *infra*.

Within a transcript or recording, deletions should be made only where the deleted material is exempt under subsection (c). Of course, the agency must maintain in its files a complete copy, without any deletions, for the period set forth in the last sentence of subsection (f)(1).

Agency fees for duplication should be uniform and contained in published regulations, as is the case under the Freedom of Information Act. Fees must not exceed the actual, direct cost of duplication (in the

the Freedom of Information Act, 5 U.S.C. § 552, and the privacy Act of 1974. 5 U.S.C. § 552a.

The defendant must serve his answer to a complaint in such an action within 20 days after the complaint is served upon him, and the court may extend this limit for up to 20 additional days upon a showing of good cause therefor. A showing of good cause requires not merely a conclusory recital that additional time is required, but an affidavit setting forth facts which justify an extension in the particular case.

The burden of proof is upon the agency to sustain the closing, withholding of information, or other action alleged to have been taken improperly. The reasons for this requirement are two: first and foremost, the presumption is in favor of openness; and second, the agency will in almost every instance be in exclusive possession of the facts relevant to the agency decision.

In considering a case under this section, the court may examine in chambers any portion of a transcript or electronic recording of a closed meeting, and may also take an additional testimonial or documentary evidence it deems necessary.

The court may award any appropriate relief (other than money damages), including an injunction against future violations of this section or a declaratory judgment that a certain practice or policy is unlawful. The court may also order the release of any portion of the transcript, recording, or transcription as does not contain information specifically exemplified from disclosure under subsection (c). The court, when acting solely under this subsection, is not authorized to set aside, enjoin, or invalidate any substantive agency action taken or discussed at the meeting in relation to which a violation of this section occurred.

The power of the court to release the non-exempt portion of a transcript, recording, or transcription of an unlawfully closed meeting points up another reason for requiring such records to be made. Since a judicial determination that a meeting was unlawfully closed will in most instances come long after the meeting has been held, and since the substantive action taken at the meeting cannot be nullified when the court is acting solely under this subsection, the possibility of finding out what transpired at the meeting represents the only realistic remedy available to a plaintiff.

Subsection (i)

This subsection authorizes a court otherwise empowered by law to review an agency action to consider in the course of its review whether the agency violated this section. This provision does not make reviewable any action that is not reviewable on another basis, nor does it make applicable to a proceeding for review of a substantive agency action the limitations of time and other procedural aspects of judicial review under subsection (h). A court reviewing compliance with this section under subsection (i) may afford any relief it deems appropriate. This might, in a rare instance, include nullification of the substantive agency action.

Subsection (j)

Subsection (j) authorizes the court to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in an action brought

under subsection (g), (h), or (i), except that costs may be assessed against an individual agency member only where the court finds that he has intentionally and repeatedly violated this section, and against the plaintiff only where the action was commenced primarily for frivolous or dilatory purposes. When costs are assessed against an agency, the court may assess them against the United States in lieu of the agency or may permit the plaintiff to elect whether to have them assessed against the agency or the United States.

While the concept of rendering individual agency members liable for attorney fees (albeit only in extraordinary instances) appears to be a novel one in Federal law, the committee notes that the Privacy Act of 1974, 5 U.S.C. § 552a, contains criminal penalties for violations, and that the Freedom of Information Act, 5 U.S.C. § 552, requires the Civil Service Commission to institute disciplinary proceedings where agency personnel act arbitrarily or capriciously in withholding documents thereunder. Further, of the 49 states that have open meeting laws, 24 impose criminal penalties for violations by government officials, two more provide for civil penalties, and 19 render the substantive action taken at an unlawfully closed meeting void or voidable.

The provision for liability on the part of a plaintiff or individual agency member should rarely have to be used, and any invocation of it should be attended by notice, an opportunity to be heard, and any other applicable aspects of due process of law.

Subsection (k)

This subsection requires each agency subject to this section to report annually to Congress regarding its compliance, including a tabulation of the total number closed to the public, the reasons for closings, and a description of any litigation brought against the agency under this section (including any costs assessed against the agency).

Subsection (l)

This subsection provides that this section is not intended to alter rights under the Freedom of Information Act, 5 U.S.C. § 552, except as expressly provided. The provisions of this section, rather than the Freedom of Information Act, shall apply to transcripts or recordings made in order to comply with this section; as is the case under that act, however, the agency must demonstrate that the material in a transcript would, if released, have the effect protected under subsection (c). Since these items must be retained for a specific time period under subsection (f)(1), this subsection removes them from the coverage of the Federal Records Act, 44 U.S.C. § 3301 et seq., which contains general standards for the disposal of agency records.

Subsection (m)

Subsection (m) provides that this section does not constitute authority to withhold information from Congress and does not authorize the closing of any agency meeting otherwise required by law to be open.

Subsection (n)

Subsection (n) provides that if a record, including a transcript or electronic recording made pursuant to this section, is accessible to an individual under the Privacy Act of 1974, 5 U.S.C. § 552a, it may not be withheld from him on the basis of this section.

Subsection (o)

Subsection (o) provides that in the event any meeting is subject to the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. I, as well as the provisions of this section, the provisions of this section shall govern. An example of this is a meeting between the collegial body heading an agency and one of the agency's advisory committees.

SECTION 4

Section 4 would establish for the first time a definite, general statutory statement as to the limitations and procedures governing ex parte communications with respect to agency proceedings. At present, such limitations and procedures are governed by agency rules and by constitutional standards, neither of which have the clarity, uniformity, and general public availability of a statute.

Section 4(a) adds a new subsection (d) to 5 U.S.C. § 557, enacting the general prohibition ex parte communications relative to the merits of a pending proceeding between an agency decision making official and an interested person outside the agency. The subsection also requires placing such communications on the public record if they do occur.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section are not intended to repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption might include, for example, requests by one party to a proceeding for subpoenas, adjournments, and continuances.

Paragraph (1)(A) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The term "interested person" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person to be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large

who makes a casual or general expression of opinion about a pending proceeding.

The rule applies to interested persons who "make or cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of causing an ex parte contact.

Contacts are prohibited with any agency member, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relative to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibted by this section.

A request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the

agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (1)(B) is the inverse of paragraph (1)(A). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1)(A).

Paragraph (1)(C) states that if an ex parte communication prohibited by this subsection is made or received by an agency official, he must place on the proceeding's public record: (i) any written communication, (ii) a memorandum stating the substance of any such illegal oral communication, and (iii) any written statements, or memoranda of any oral statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively nullified. Agency officials who make an ex parte conact are under the same obligation to record it publicly, as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certin cases actual notice of the ex parte communication to be provided to all parties.

Paragraph (1)(D) states that the officer presiding over the agency hearings in the proceeding may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 4(c), which amends 5 U.S.C. S 556(d) to authorize an agency to consider a violation of this section as grounds for ruling against a party on the merits. Subparagraph (D) insures that the record contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of subsection 4(c), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus, a showing should not be required where the violation was clearly inadvertent.

Paragraph (1)(E) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

The new subsection 557(d) would also provide that section 557 is not authority to withhold information from Congress. While the pro-

hibitions on ex parte communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.

Subsection 4(b) adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceedings, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection 4(c) amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes."

For example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

It is expected that an agency will rule against a party on the merits under this subsection only in rare instances, and in no case wherein the party demonstrates that the violation was inadvertent. However, the committee felt it very important that an agency have this option available where the circumstances justify it.

Section 5

Section 5(a) conforms 39 U.S.C. § 410(b)(1) to the open meeting provisions of this bill and the Privacy Act by clarifying the applicability of these statutes to the Postal Service.

Section 5(b) amends exemption (3) of the Freedom of Information Act, 5 U.S.C. § 552, to conform it to exemption (3) of the open meeting

provisions of this bill and to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1972).

Robertson held that exemption (3), which exempts from the coverage of the Freedom of Information Act any information "specifically exempted from disclosure by statute," includes within its ambit section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504), which allows the FAA Administrator to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public."

Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S C. §§ 2161–66, which provides explicitly for the protection of certain nuclear data.

Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart blanche* to withhold any information he pleases, would not come within exemption 3. Similarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. *See Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.

Examples of statutes that could justify withholding under the amended exemption (3) includes sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e–5(b), 2000e–8(e)) and section 314(a)(3) of the Federal Election Campaign Act (2 U.S.C. S 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

SECTION 6

Section 6 provides that, with the exception of subsection (g) of the new 5 U.S.C. § 552b added by this act, the act shall take effect 180 days after the date of its enactment. Subsection (g), which requires the affected agencies to promulgate regulations within 180 days after it

takes effect, is to take effect upon enactment; this will assure that regulations have been promulgated by the time the substantive provisions of the open meeting portion of the bill come into force.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute;]

(3) required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

* * * * * * *

§ 552b. Open Meetings

(a) For purposes of this section—

(1) the term "agency" means the Federal Election Commission and any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of agency business; and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose information required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public by the agency, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d) (1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote

may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thity days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of the portions of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such portions in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier an-

nouncement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(f) (1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency, by recorded vote taken subsequent to the meeting and promptly made available to the public, determines to contain information specified in paragraphs (1) through (10) of subsection (c). In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the portion of subsection (c) and any other statute said to permit the deletion. Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. Except to the extent provided in subsection (i) of this section, nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceeding, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

(j) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g), (h), or (i) of this section, except that costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(k) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(l) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such action to copy or inspect the transcripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

(m) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any any agency meeting or portion thereof otherwise required by law to be open.

(n) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this title.

(o) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.

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§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, ad-

ministrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This section does not constitute authority to withhold information from Congress.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a* (*records about individuals*), *section 552b* (*open meetings*), section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

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ADDITIONAL VIEWS OF HON. FRANK HORTON (CONCURRED IN BY HON. JOHN N. ERLENBORN, HON. JOHN W. WYDLR, HON. CLARENCE J. BROWN, HON. SAM STEIGER, HON. GARRY BROWN, HON. EDWIN B. FORSYTHE, AND HON. WILLIS D. GRADISON, JR.)

Introduction

The undersigned subscribe wholeheartedly to the objectives of this legislation. The public's faith in the integrity of government rests on public understanding of the reasons for governmental decisions, and on the accountability of government officials for particularly those decisions which set legislative or administrative policies which impact on the nation as a whole. However, as recognized in the "Declaration of Policy" which begins on the first page of H.R. 11656, the public is not necessarily served by complete and unfettered disclosure of all government decisionmaking processes. The words "fullest practicable information" as used in the bill indicate the need for certain sensible limitations.

Our differences with the Committee bill are relatively few, but they afford an opportunity for highly significant improvements. Our principal concern is that the Congress which has enacted the two basic planks for federal information policies, the Freedom of Information Act and the Privacy Act, should adopt a sunshine bill which is consistent with the principles laid down in the two landmark bills we have already enacted. The Committee bill does not fully meet this standard since it erodes the clarity and firmness of the FOI Act exemptions, and threatens to erode the privacy protections we have erected for those involved in adjudications before collegial agencies.

We believe that a number of provisions of the Committee bill are inconsistent with the Declaration of Policy contained in the bill itself, and that these provisions would permit or mandate disclosures which would injure the rights of individuals and injure the ability of the Government to carry out its responsibilities.

We addressed our concerns with several specific provisions of H.R. 11656 in Committee, and we feel it is possible to amend the bill in a way that would let every bit as much sunshine behind the doors of government agency deliberations and provide a brand of sunshine which is less clouded by procedural red tape and confusion than that created by the Committee bill.

Our differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of "agency", (3) the definition of "meeting", (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the personal liability of individual agency officials, and (7) the unfettered disclosure of all ex parte communications. These differences are summarized below.

NEEDED IMPROVEMENTS

(1) The Verbatim Transcript Requirement

The verbatim transcript requirement of H.R. 11656 could effectively destroy the provisions of the bill which permit certain meetings to be closed. While the provisions of the bill enable an agency to delete, by recorded vote at a subsequent meeting, sensitive portions of a transcript, they also require the agency to furnish the public what, in effect, are summaries of the deleted portions. In the case of agencies involved in the regulation of financial institutions, for example, harmful inferences drawn from the deletions could result in market speculation or damage to the stability of our financial markets and institutions.

The possibility of later disclosure of a verbatim transcript will inhibit free discussion about sensitive matters and thus impair the decisionmaking process in instances where candor is essential.

Moreover, the effect of the transcript requirement of the bill when coupled with relevant procedural requirements would lead to a situation bordering on the ridiculous.

The bill provides that votes to close meetings must be cast in person, no proxies being permitted. Thus a meeting must be held to vote on closing a subsequent meeting or meetings, and another meeting must be held to vote on any change in the time, place, or subject matter of a meeting already announced.

When these procedural requirements are coupled with the verbatim transcript or electronic recording requirements, the prospect is one of mind-boggling infinity. Thus, when a meeting is properly closed, the complete transcript or electronic recording of the proceedings must be made available to the public except for such portions determined by a recorded vote to fall within the exemptive provisions. In order to avoid the disclosure of such portions of the transcript, the meeting called to discuss, consider and vote on the proposed deletions must also be closed pursuant to the procedural requirements cited above. Since this meeting would be closed to consider information coming within the exemptive provisions of the bill, the complete transcript or electronic recording of such meeting must also be made available to the public except for those portions determined by a recorded vote to fall within the exemptive provisions. Again, in order to avoid the disclosure of such portions of the transcript of the second closed meeting, a third meeting called to consider and vote on the proposed deletions stemming from the second meeting must be closed, and the transcript of that meeting must be examined at a fourth closed meeting and so on and on ad infinitum. Obviously, some rule of reason must prevail in the implementation of such a provision, but the letter of the law, if observed, would be paralytic in its effect.

We do not subscribe to the position that the transcript requirement is essential to the enforceability of the act and we feel that a reasonable compromise can be worked out in this area. The discovery procedures available to U.S. District Courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. While the concepts embodied in H.R. 11656 stem from "Sunshine" or "open meeting" statutes of the States, none of the 49 State

statutes, so far as we can determine, has a verbatim transcript requirement for either open or closed meetings.

(2) *The Definition of "Agency"*

The definition of "agency" contained in H.R. 11656 is unclear and would lead to unnecessary confusion and litigation.

The agencies to be covered can and should be specifically listed. A successful precedent for this approach is the Government Corporation Control Act of 1945, 31 USC 841 et seq. This Act has been amended on several occasions to add or delete particular corporations. This procedure would be appropriate for H.R. 11656. Congress can, of course, always amend the Act to add or delete agencies but would be required to review the applicability of the Act on the infrequent occasions when such an agency is created.

(3) *The Definition of "Meeting"*

Meetings covered by the bill should be those gatherings for the purpose of conducting official agency business of at least the number of individual agency members required to take final action on behalf of the agency. The meeting definition in H.R. 11656 would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency.

(4) *Identification of Persons Attending Closed Meetings—*

The requirement of H.R. 11656 that an agency publicly list all persons expected to attend a closed meeting and their affiliations would permit inferences not in the public interest to be drawn from such information. Particularly in adjudicatory proceedings falling under one of the 10 exemptions from the open meetings requirement, premature disclosure of the names of individuals or organizations, concerning or against whom official action may or may not be taken, could lead to damaging speculation or premature public reaction that could result in damage to individual rights, to financial markets or to other interests that should legitimately be protected by government regulators.

(5) *Venue For Actions Brought Under the Legislation*

We feel that venue for actions brought under the legislation should be limited to the district in which the agency in question has its headquarters or where the meeting in question occurred. H.R. 11656 permits such actions to be brought also where the plaintiff resides or has his principal place of business. This could lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings.

(6) *Personal Liability of Individuals*

We question the provisions of H.R. 11656 imposing personal liability on individual agency members for attorney's fees and court costs. The assessment of attorney fees and other litigation costs personally against individual members of an agency can only lead to a further diminution of the rewards of public service. This provision would not only discourage qualified persons from accepting agency appointments, but would inhibit performance of official duties by those in office.

(7) *Ex Parte Communications*

H.R. 11656 would place in the public record all documentation of prohibited ex parte communications even those dealing with matters which, if the subject of an agency meeting, would permit the closing of such meeting, or, if the subject of a request for documents under the Freedom of Information Act, would be exempt from disclosure under one of the Act's exemptions. We fully support the prohibition of ex parte contacts, but feel this provision could be abused to force disclosure of otherwise exempt information.

COST

It is not possible to estimate the the costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

SUMMARY

In summary, we support the purposes of H.R. 11656, but we feel the bill should be improved to avoid disclosures not in the public interest, invasions of privacy, excessive costs, and the disruptions and delays of agency proceedings that are bound to result from the enactment of H.R. 11656 in its present form.

We concur in the foregoing views:

FRANK HORTON.
JOHN N. ERLENBORN.
JOHN W. WYDLER.
CLARENCE J. BROWN.
SAM STEIGER.
GARRY BROWN.
EDWIN B. FORSYTHE.
WILLIS D. GRADISON, Jr.

ADDITIONAL VIEWS OF HON. CLARENCE J. BROWN

I concur fully with the views expressed by my colleague, Congressman Horton.

While I strongly support the policy of open meetings as vital to maintaining and enhancing the integrity of the governmental process, I feel that H.R. 11656 fails to make what I believe is a necessary distinction between the rule-making (quasi-legislative) and the adjudicatory (quasi-judicial, quasi-administrative) functions of the agencies covered by this legislation.

Meetings of an agency at which decisions of applicability to the general public are made are quasi-legislative, and therefore should most definitely be open to the public. On the other hand, those meetings at which decisions are made that affect only the status of the parties involved are quasi-adjudicatory in nature, and should in appropriate cases be permitted to remain private until a final decision is reached in order to protect to the fullest extent possible the rights of the individuals or parties involved.

It makes bad law for us not to draw these distinctions, and emphasizes the contradiction in current Congressional passions for the public's right to know, and the individual's right to privacy. The schizoid nature of Congressional attitude in these areas needs to be clarified. Rather than clarifying, this legislation only serves to blur them further.

CLARENCE J. BROWN.

ADDITIONAL VIEWS OF HON. PAUL N. McCLOSKEY, JR., HON. JOHN N. ERLENBORN, HON. GARRY BROWN, HON. CHARLES THONE, HON. EDWIN B. FORSYTHE, HON. ROBERT W. KASTEN, JR., AND HON. WILLIS D. GRADISON, JR.

This "Sunshine" bill has a laudable purpose. As written, however, the bill imposes incredible new burdens on the day-to-day operations of government.

H.R. 11656 received very little testimony before the House Subcommittee on Government Information and Individual Rights (B. Abzug, Chairperson), partly because it was originally taken almost verbatim from S. 5, passed by the Senate by a vote of 94 to 0.

Whenever the Senate acts unanimously, it behooves us to examine their work carefully to determine whether such unusual agreement betokens careful craftsmanship or uncommon inattention. In this instance, we believe the latter description applies.

All of us desire that the affairs of government be conducted as openly as possible "in the sunshine," as it were.

Likewise, however, all of us have agreed of late that we should try to cut the cost of government, and, in particular, that we should try to cut the need for mountains of paperwork.

Similarly, we believe we are beginning to perceive a need to discourage undue litigation in the court system. Our federal judges are already underpaid and overworked.

Balancing these three goals, (1) open government (2) cutting costs of government and (3) discouraging undue litigation, how does the "Sunshine" bill, H.R. 11656, measure up?

First of all, it is a lawyer's dream. Imagine the right to bring a lawsuit and be guaranteed attorney's fees and costs merely if you "substantially prevail?" (Page 12, line 20 et seq.)

Further, note that as a plaintiff, not only can you obtain personal costs against individual agency members in certain cases (pages 12–13), but that costs cannot be assessed against you, even if you lose, at least not unless you are found to have initiated the lawsuit "primarily for frivolous or dilatory purposes" (page 13, lines 2–4). Further, note with pleasure that the burden of proof is always on the government!

Finally, note that one can bring such a lawsuit against any agency covered in the Act in the plaintiff's own home district, regardless of where the meeting is held. (Page 11, lines 16–18.)

What a bonanza for the legal profession?

Assume, for example, that the SEC wishes to hold a closed meeting in Washington on the question of whether to order a cessation in trading of Lockheed shares on the stock market.

Any shareholder or citizen residing in any one of the 50 states could bring a lawsuit in his home district to contest the closing of the meeting. The SEC would be required to answer an ordinary complaint in

20 days, or within 40 days if it could show good cause, but this is a simple responsibility compared to the SEC's problem if a few Lockheed shareholders in different states should elect to sue to enjoin the SEC from closing its meeting.

Consider the legal cost to a Washington-based agency in defending against a temporary restraining order, in Alaska on Friday, Hawaii on Monday and Idaho on Tuesday!

The legal burden imposed on a single agency by the unique combination of legal rights and duties contained in H.R. 11656 could constitute an unconscionable burden on the public treasury, as well as practically paralyze the Justice Department and the legal staff of the agency involved.

At least 38 agencies are covered by this bill, and each one of them is subject to an easily-brought lawsuit every time a meeting is closed under one of ten permitted exemptions.

Also, the exemptions are by no means clear cut. Take exemption (6) for example (page 4, lines 1–3), permitting closure when a meeting is likely to: "disclose information of a personal nature were disclosure would constitute a clearly unwarranted invasion of personal privacy."

This kind of language permits a bona fide court test of almost any privacy contention an agency might determine as the basis for closing a meeting.

Do we really want to subject all agencies of the federal government "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President" (page 2, lines 10–14), to such risk of litigation?

It is true that a majority of the Members of the House are lawyers. It is likewise true that many of us anticipate returning to the practice of law at some future date. (Some of us sooner than others if the impact and costs of this bill are ever understood by the organized Bar and the public.) But do we really need to create such a new and profitable field of employment for our own profession?

We have to confess to a certain feeling of inadequacy at having failed initially to perceive the serious problems with the bill, or to persuade our colleagues on the Government Operations Committee of the need for its substantial amendment.

We have not mentioned in these views the cumbersome nature of the notice and verbatim transcript provisions of the bill mentioned in the views of our colleague, Frank Horton, but their possible costs could also be monumental. In our haste to pass the bill, we think the least the Committee could have done was to wait for testimony by the Administration on its potential budgetary impact.

Unfortunately, the Committee received no testimony whatsoever on the magnitude of potential costs, either legal or administrative.

Upon reflection, it seems to us that the cumulative effects of the pernicious provisions of H.R. 11656 outweigh the bill's usefulness. Unless the Horton substitute can be adopted, we are impelled to conclude that the bill should be recommitted for more careful draftsmanship.

PAUL N. MCCLOSKEY, JR.,
JOHN N. ERLENBORN,
GARRY BROWN,
CHARLES THONE,
EDWIN B. FORSYTHE,
ROBERT W. KASTEN, JR.,
WILLIS D. GRADISON, JR.